

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Improving Public Safety Communications)	WT Docket No. 02-55
in the 800 MHz Band)	
)	
Consolidating the 900 MHz Industrial/Land)	
Transportation and Business Pool Channels)	

COMMENTS OF ACCESS SPECTRUM, LLC

Mark E. Crosby, President
Access Spectrum, LLC
Two Bethesda Metro Center
Bethesda, Maryland 20814
(301) 941-1100

February 10, 2003

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	PUBLIC SAFETY INTERFERENCE CAN BE RESOLVED WITH MINIMAL DISRUPTION TO PUBLIC SAFETY AND OTHER 800 MHz LICENSEES.	5
A.	800 MHz Interference Is Not a Nationwide Problem Demanding a Nationwide Solution.	5
B.	Resolving Interference At The Local Level Is A More Effective, Efficient and Less Costly Solution Than Nationwide Reallocation.	8
C.	An “Interference Coordinating Committee” Should Be Established to Identify Interference “Hot Spots” and Implement Proactive Measures to Mitigate Potential Interference.	9
III.	THE “SPECTRUM EXCHANGE” PROPOSAL IS UNNECESSARY AND SHOULD BE REJECTED.	11
A.	Nextel Is Obligated To Resolve The Interference Caused By Its Operations. ..	12
B.	The Proposed “Spectrum Exchange” Would Substantially Increase the Value of Nextel’s Spectrum Assets and Improve Its Spectrum Position.	13
C.	Competitively Neutral Mechanisms Exist To Make Licensees Surrendering Spectrum “Whole” While Remaining Consistent with the Communications Act and FCC Policy and Precedent.	18
IV.	CONCLUSION	19

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Improving Public Safety Communications)	WT Docket No. 02-55
in the 800 MHz Band)	
)	
Consolidating the 900 MHz Industrial/Land)	
Transportation and Business Pool Channels)	

COMMENTS OF ACCESS SPECTRUM, LLC

Access Spectrum, LLC (“Access Spectrum”) hereby submits its Comments on the Supplemental Comments of the Consensus Parties (“*Supplemental Comments*”) filed on December 24, 2002, in the above-captioned proceeding.¹ As further detailed below, Access Spectrum strongly supports solutions to the 800 MHz interference predicament that minimize the disruption to existing licensees and that avoid any unjust enrichments to an individual licensee or class of licensees.

I. INTRODUCTION AND SUMMARY

Access Spectrum is pleased to participate in the FCC’s efforts to develop a full and complete record in this proceeding before it settles on a long-term solution to interference in the 800 MHz band. To this end, it is apparent that many of the Consensus Parties have devoted considerable time and effort to develop a proposal to remedy the interference to public safety and private wireless systems caused principally by cellular systems operated by Nextel

¹ Wireless Telecommunications Bureau Seeks Comments on “Supplemental Comments of the Consensus Parties” Filed in the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, DA 03-19 (rel. January 3, 2003) (“*Public Notice*”).

Communications, Inc. (“Nextel”).² However, it is clear to Access Spectrum that the motivation of the individual members of the Consensus Parties to act in the public interest is influenced by their self-interest in either securing valuable spectrum for free or obtaining their portion of an \$850 million cash outlay. In turn, the \$850 million is simply part of an attempt to secure a valuable piece of spectrum without competition and without adequately compensating the public. Access Spectrum conservatively estimates that the net increase in value of Nextel’s spectrum holdings would be at least \$2 billion if the spectrum swap aspect of the Consensus Parties’ proposal were adopted. The Commission must parse out these private agendas and maintain focus on solving interference.

When considering the Consensus Parties’ proposal, the Commission should adhere to the guiding principle articulated in its Notice of Proposed Rulemaking: the identification of practical solutions that resolve the potential for interference consistent with minimal disruption to incumbent licensees.³ The record does not contain sufficient objective data that the scope of the interference problem warrants as costly and disruptive a solution as the nationwide reallocation scheme proposed by the Consensus Parties. Moreover, in accordance with its well-settled

² For the sake of clarity, Access Spectrum herein refers to the Joint Commenters as the “Consensus Parties” and the August 7, 2002, Reply Comments of the Joint Commenters as the “Consensus Plan.” As the Wireless Telecommunications Bureau made clear in the *Public Notice*, however, the self-styled “Consensus Plan” does not represent a consensus reached by all parties to this proceeding. In fact, the “Consensus Plan” does not represent a true consensus at all. Numerous affected parties, including members of the public safety community, critical infrastructure entities, SMR licensees, and cellular carriers either oppose, express serious concerns about, or refuse to endorse the Consensus Plan. See September 23, 2002 Further Comments of Southern LINC at 3-5 (discussing the wide lack of support for the Consensus Plan); Further Comments of ALLTEL, *et. al*, at 2 (discussing same); September 23, 2002 Comments of Dallas Area Rapid Transit at 3 (noting Consensus Plan does not include key users).

³ See Improving Public Safety Communications in the 800 MHz Band; and Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rulemaking*, 17 FCC Rcd 4873, 4785 ¶¶ 2, 20 (2002) (“800 MHz NPRM”).

policies, the Commission should impose the full costs of resolving interference where they belong -- on the parties causing interference -- and should not permit this proceeding to be used as a back-door means of relieving interfering parties from their legal obligations.

The Commission does not need to adopt the Consensus Parties' proposal in order to resolve interference to public safety. The remedies can be implemented exclusively within the 800 MHz band at the local level. In fact, despite their nationwide realignment proposal, even the Consensus Parties recognize that public safety interference resolution will ultimately occur at the local level. The Commission should therefore adopt policies and procedures that recognize and account for the vast differences in the 800 MHz spectrum environments existing from community to community. Addressing interference specifically where it does (or is likely to) occur, is more effective and efficient, and less costly and disruptive, than the elaborate proposal of the Consensus Parties. Accordingly, Access Spectrum urges the Commission to adopt the following plan of action that best satisfies the dual objectives of remedying interference to 800 MHz public safety systems *and* minimizing disruption to incumbent licensees:

- Develop a set of policies and procedures that enable interference resolution measures to be implemented at the local level, an approach the Consensus Parties recognized as necessary even if the Commission were to adopt their proposed nationwide band realignment. The standards set forth in Appendix F of the Consensus Parties' *Supplemental Comments* may provide an appropriate framework for this approach as it articulates many valuable principles, such as reliance on approaches described in the *Best Practices Guide*, and the Consensus Parties have already agreed to comply with the procedures. The application of these procedures will minimize disruption to existing 800 MHz licensees while still attacking the problem at its source. Also, containing the solution to the 800 MHz band will *eliminate* any disruption to existing licensees in other bands.
- Identify interference hot spots, *i.e.*, geographic areas that share usage patterns and spectral environments that expose these areas to greater susceptibility of interference, to assure that necessary adjustments are implemented *before* harmful interference occurs and possibly adversely affects public safety communications. Licensees in areas of the country where there is little or no possibility of harmful interference will

not be burdened and resources will be conserved by avoiding the implementation of an untested solution that is not necessary in many areas of the country.

- Create an “Interference Coordination Committee” (“ICC”) to identify the interference “hot spots” and oversee the implementation of procedures to resolve interference problems. Similar to the Consensus Parties’ proposed “Relocation Coordination Committee,” the ICC should be representative of all 800 MHz incumbents subject to interference resolution. The ICC would be responsible for prioritizing those areas with the greatest susceptibility to interference and for implementing immediately measures to avoid the potential interference problem in those areas, including, where necessary, a localized realignment of the 800 MHz band. Consistent with FCC policy that those entities causing interference are responsible for resolving such interference, the ICC would identify the responsible party and determine the reasonable costs for resolution, including related ICC costs.

Following Access Spectrum’s recommended plan of action frees the Commission to summarily reject Nextel’s spectrum swap proposal, which suffers from several fatal flaws:

- The “spectrum exchange” is unnecessary to resolve interference to public safety licensees in the 800 MHz band.
- Nextel is required to resolve the interference to 800 MHz licensees caused by its operations. Therefore, its offer to pay up to \$850 million to address the problem is not a voluntary payment deserving of praise. It is Nextel’s obligation, and since it is unclear what sums will be needed to correct the problems that it has caused, this amount may be only a partial payment to meet that obligation.
- Far from an equal exchange, the proposed spectrum swap would significantly improve Nextel’s spectrum assets and competitive position, amounting to an unjustified and legally questionable spectrum windfall. Nextel should not be rewarded for fulfilling its interference resolution obligation, nor should it be allowed to return substantially less usable and less valuable spectrum for a nationwide PCS license.

To the extent *any* 800 MHz licensee is required to surrender any usable spectrum as part of a localized 800 MHz interference mitigation program, the Commission can consider whether this surrender warrants reimbursement through the issuance of a freely transferable Auction Discount Voucher (“ADV”). As the Commission has done previously, this voucher would be usable by the licensee (or a transferee) in any upcoming auction of spectrum. Unlike the Consensus Parties’ unjustified and legally questionable “spectrum exchange” proposal, the grant

of an ADV which targets and quantifies the value of specific spectrum being surrendered and provides a corresponding credit to the licensee, is consistent with Section 309 and the FCC's auction and spectrum allocation policies. It also maintains competitive neutrality by ensuring that no licensee gets an improper marketplace advantage in the delivery of advanced wireless services simply because it fulfilled its responsibly to participate in the resolution of harmful interference it is causing.

II. PUBLIC SAFETY INTERFERENCE CAN BE RESOLVED WITH MINIMAL DISRUPTION TO PUBLIC SAFETY AND OTHER 800 MHz LICENSEES.

Access Spectrum believes the Commission correctly set forth the guiding principle in this docket, namely, the reduction of public safety interference with minimal disruption to licensees and to the existing licensing structure. Given the wide range of opinion on the severity and frequency of interference in the 800 MHz band, Access Spectrum strongly believes that the scope of the interference problem does not warrant the disruptive and costly nationwide band realignment proposed by the Consensus Parties. Access Spectrum submits that less burdensome alternatives exist to resolving interference in the 800 MHz band, alternatives that recognize and account for the vast differences in the 800 MHz spectrum environment that exist from community to community.

A. 800 MHz Interference Is Not a Nationwide Problem Demanding a Nationwide Solution.

The Commission has recognized that, “no one restructuring candidate appears fully able to meet our goal of reducing or eliminating interference without burdening existing licensees.”⁴ Any nationwide reallocation of spectrum presents a zero-sum game, where additional spectrum

⁴ See 800 MHz NPRM at ¶ 20.

(and the associated benefit) is awarded to some licensees at the expense of others. Access Spectrum agrees with the Commission’s tentative conclusion that “interference to public safety systems presents a significantly serious problem that a solution must be found.”⁵ However, the record does not contain sufficient evidence to suggest that the scope of the interference problem (either today or in the future) is nationwide or otherwise warrants as radical and disruptive a solution as the proposed nationwide reallocation scheme. Rather, the record contains anecdotal and conflicting examples.

For example, the Consensus Plan cited the City of Baltimore, Maryland, as an example of a public safety user experiencing “pervasive interference problems” that required a \$70 million upgrade in its public safety communications systems “only to continue experiencing harmful interference.”⁶ As the City of Baltimore made clear in its Supplemental Comments on the Consensus Plan, however, it is not experiencing “pervasive interference problems,” and the upgrade was not undertaken to resolve interference, but rather to move from outdated to modern technology.⁷ More generally, the record contains conflicting statements regarding the extent of the interference experienced by 800 MHz licensees, ranging from “pervasive interference problems,” to “minor daily interference,” to no interference problems at all.⁸

⁵ *Id.* at ¶ 16.

⁶ *See* August 7, 2002 Joint Reply Comments of Aeronautical Radio, Inc., *et. al.* at 4 (“*Consensus Plan*”).

⁷ *See* Supplemental Comments of City of Baltimore, Maryland at ¶ 3 (questioning whether a costly nationwide overhaul of the entire 800 MHz band is warranted).

⁸ *See e.g.*, Reply Comments of The New Jersey Transit Authority at ¶ 2 (noting widespread disagreement over scope of interference problems); Comments of Verizon Wireless at 4 (same); Comments of Dallas Area Rapid Transit at 2 (noting that it does not experience interference at this time); Comments of Southern Electric Cooperative, Inc., Northern Electric Cooperative, Inc., H-D Electric Cooperative, Inc. at 2 (same); Comments of Sid Richardson Energy Services

This wide range of reports about the scope and frequency of interference is not surprising given the vast range of variations in terrain, infrastructure technology, transmitter and mobile power levels, type of radios, channel usage, antenna design and siting, inter-service sharing policies and shared trunked systems that exist from community to community. As was recognized in the *Best Practices Guide*, “the most effective actions to address public safety interference will depend on the specifics of each particular situation.”⁹ If there was ever a task where the “devil is in the details,” spectrum management and interference mitigation is it. It is axiomatic that interference potential is highest in urban areas where customer demand for Nextel services is high, the number of public safety users is large, and, as a result, public safety users are forced to operate in close proximity to Nextel antennas.¹⁰ In contrast, the potential for interference is lower in non-urban areas where Nextel system deployment is less dense, fewer law enforcement and other critical industries operate in the 800 MHz band, and therefore networks operate distantly, both spatially and spectrally, from each other. Therefore, the optimal solution and timing for resolving potential and existing interference in New York City, for example, will be vastly different than the optimal solution for Nashville, Tennessee, which in turn may be different than the solution for Snohomish County, Washington.

Co. at 2 (same); Comments of Jones Onslow Electric Membership Corporation at 5-6 (same); Comments of City of Portland Oregon at 2-3 (noting that it has been experiencing “pervasive interference problems”); Comments of King County Information and Telecommunications Services Division at 1 (noting “increasing amount of interference”); Comments of San Francisco Bay Area Rapid Transit District at 1 (noting “minor daily interference”).

⁹ See *Avoiding Interference Between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz – A Best Practices Guide*, December 2000, at 11 (“*Best Practices Guide*”).

¹⁰ See *800 MHz NPRM* at ¶ 11 (describing the differing needs and characteristics among various public safety systems).

B. Resolving Interference At The Local Level Is A More Effective, Efficient and Less Costly Solution Than Nationwide Reallocation.

Interference is a local issue that is most efficiently addressed on the local level. Imposing a nationwide reallocation of a band that has significant variations in spectrum environments is completely unnecessary. In many communities, nationwide reallocation would impose burdens on licensees that are not experiencing interference, and are unlikely to experience interference in the future. Furthermore, there is widespread agreement that the proposed nationwide realignment alone will *not* reduce interference to an acceptable level in those communities where public safety licensees are experiencing harmful interference from Nextel. Access Spectrum believes the public interest would be served better by adopting the more effective and less burdensome solution of codifying policies and procedures that “minimize the conditions that give rise to CMRS-public safety interference”¹¹ at the local level.

The Commission itself has already observed that a nationwide reallocation may not be sufficient to resolve the problem absent “additional palliative measures.”¹² Similarly, the Consensus Parties recognize that “no band plan can eliminate entirely all possibility of interference under all circumstances.”¹³ Accordingly, the 800 MHz licensees that comprise the Consensus Parties agreed to a set of “proposed policies and procedures” designed to address interference problems that occur both during and *after* the Consensus Parties’ proposed band

¹¹ *Supplemental Comments* at 39.

¹² *800 MHz NPRM* at ¶ 73.

¹³ *Supplemental Comments* at 39.

realignment.¹⁴ Thus, despite their nationwide realignment proposal, even the Consensus Parties recognize that public safety interference resolution is a local matter.

In lieu of adopting the nationwide band realignment proposal, Access Spectrum urges the Commission to adopt policies and procedures of the type outlined in Appendix F that require interference resolution measures implemented at the local level, recognized by the Consensus Parties as necessary regardless of any nationwide realignment solution.¹⁵ Access Spectrum believes the adoption of such policies and procedures will provide a more effective, less costly and less burdensome long-term solution to resolving interference than the wholesale nationwide realignment of the 800 MHz band.

C. An “Interference Coordinating Committee” Should Be Established to Identify Interference “Hot Spots” and Implement Proactive Measures to Mitigate Potential Interference.

Immediately upon adoption of the Report and Order in this proceeding, the FCC should empower an industry committee to begin immediately identifying interference “hot spots” around the country – areas that share usage patterns and spectral environments that make them more susceptible to interference. After these “hot spots” are identified and prioritized, work would begin immediately to implement the measures necessary to resolve the interference problem in those areas including, where necessary, a localized implementation of the band

¹⁴ See *id.* at Appendix F.

¹⁵ Among the additional measures outlined in Appendix F are new interference thresholds, new intermodulation and noise interference standards, the deployment of more interference resistant receivers and other location-specific efforts to resolve interference, as well as adherence to procedures and actions set forth in a revised *Best Practices Guide*. See *Supplemental Comments* at Appendix F.

realignment proposed by the Consensus Parties.¹⁶ Identifying these “hot spots” will help assure that necessary adjustments are implemented *before* harmful interference adversely affects public safety licensees. This solution avoids burdening licensees in areas of the country where there is little or no possibility of harmful interference, and conserves resources by avoiding a widely implemented, “untested” solution that is not necessary in many areas of the country and may not achieve the desired goal in others.

To facilitate the identification of “hot spots” and the determination of appropriate interference mitigation measures, Access Spectrum urges the Commission to create an “Interference Coordination Committee” (“ICC”). Similar to the Consensus Parties’ proposed “Relocation Coordination Committee,” the ICC should be representative of all 800 MHz incumbents subject to interference resolution.¹⁷ After the ICC identifies and prioritizes the “hot spots,” the ICC would work with the parties involved to implement immediately the measures necessary to resolve the interference problem in those areas. Consistent with FCC policy, those entities causing interference would be responsible for funding the mitigation of such interference. The ICC would also be the initial party to review interference disputes and determine the responsible party, if any.

Access Spectrum believes the identification and prioritization of these “hot spots,” combined with the codification of policies and procedures of the type set forth in Appendix F, will facilitate the mitigation of interference by those entities either receiving interference or

¹⁶ Consistent with FCC policy, those entities causing interference would be responsible for funding the mitigation of such interference.

¹⁷ See *Supplemental Comments* at 15-17. The Consensus Parties’ proposed “Relocation Coordination Committee” is further discussed at Appendix C, Section I. E. of the *Supplemental Comments*.

predicted to receive interference. This would best achieve the Commission's goal of resolving the potential for interference while minimizing disruptions to those existing licensees that are unaffected by 800 MHz interference.

III. THE "SPECTRUM EXCHANGE" PROPOSAL IS UNNECESSARY AND SHOULD BE REJECTED.

Following the above-outlined plan of action, it is clear that Nextel's "spectrum exchange" idea is unnecessary. In any event, the proposal is anticompetitive and should be flatly rejected. Even under the realignment plan supported by the Consensus Parties, all incumbent licensees would be able to remain within the 800 MHz band, and no licensee will be compelled to relocate to other bands. Consequently, Nextel's 700 MHz and 900 MHz licenses are not needed to achieve that solution.¹⁸ Nonetheless, Nextel contends that it must be "made whole on a spectral basis" for the 700 MHz, 800 MHz and 900 MHz channels it voluntarily proposes to surrender by receiving "a replacement 10 MHz nationwide license at 1910-1915/1990-1995 GHz."¹⁹ In fact, Nextel's offer to participate in funding the proposed realignment of the 800 MHz band is *expressly conditioned* on the Commission granting Nextel this "replacement" 10 MHz of contiguous spectrum.²⁰

This proposed "spectrum exchange" does significantly more than make Nextel "whole" with "replacement" spectrum; it would greatly increase the value of its spectrum holdings and improve its spectrum position. Nextel proposes to "replace" a patchwork of significantly less valuable, non-nationwide, non-contiguous and often-encumbered spectrum holdings with a

¹⁸ See *Consensus Plan* at 24.

¹⁹ *Supplemental Comments* at 13, ii, 4 at n.6.

²⁰ See *id.* at ii, 4 at n.6.

valuable nationwide PCS license, without participating in a competitive bidding process, as all of its PCS competitors have been required to do. Nextel's transparent attempt to coerce the grant of a competitive windfall of spectrum in exchange for participating in the resolution of interference *that is principally caused by its own operations* should be rejected.

A. Nextel Is Obligated To Resolve The Interference Caused By Its Operations.

As the primary source of 800 MHz interference, Commission precedent and policy require Nextel, as the "last-in licensee," to take whatever measures are necessary to resolve harmful interference caused by its operations.²¹ Section 90.173(b) of the Commission's Rules obligates "all applicants and licensees" to cooperate in the "use of frequencies in order to reduce interference."²² If interference exists, Section 90.403(e) states that licensees *shall* take steps to mitigate it.²³ The fact that a licensee is authorized to operate on the frequencies involved does not absolve it of its obligation to take such corrective measures for "coordination and licensing are not in and of themselves guarantees against interference."²⁴ Nextel's proffer of \$850 million for band realignment, rather than being conditioned on receipt of the spectrum windfall, should be used as a down payment for interference resolution. As Nextel has stated, this payment will

²¹ Where disputes among licensees arise, the FCC generally has relied on its long-standing policy that "the last in, fixes the problem." *See Midnight Sun Broadcasting Co.*, 3 RR 1485 (1947); *Jesse Willard Shirley*, 24 RR 2d 982 (1972); *Sudbrink Broadcasting of Georgia, Inc.*, 65 FCC 2d 691 (1977); *Jack Straw Memorial Foundation*, 35 FCC 2d 397, *recon. denied*, 37 FCC 2d 544 (1972). Access Spectrum acknowledges that although there may a limited number of exceptions, in the vast majority of cases Nextel was the "last in" licensee in the communities experiencing public safety interference.

²² 47 C.F.R. § 90.173(b) (2002).

²³ 47 C.F.R. § 90.403(e) (2002).

²⁴ *Texidor Security Equipment*, 4 FCC Rcd 8694, 8695 ¶ 16 (1991).

greatly reduce the risk of additional cases of interference.²⁵ Commission rules and precedent require that Nextel not be allowed to limit its underlying responsibility by imposing a cap on the amount it would be required to pay to resolve such interference.²⁶

B. The Proposed “Spectrum Exchange” Would Substantially Increase the Value of Nextel’s Spectrum Assets and Improve Its Spectrum Position.

The proposed “spectrum exchange” would provide Nextel with a 10 MHz nationwide license at 1910-1915/1990-1995 MHz. In return, Nextel proposes to surrender licenses that it holds in the 800 MHz, 700 MHz and 900 MHz bands. The Consensus Parties characterize this exchange as involving a “replacement” of spectrum lost by Nextel that is necessary to make Nextel “whole,” implying that the trade involves comparable spectrum.²⁷ Nextel has in fact characterized this spectrum swap as “an equal exchange.”²⁸ It is clear, however, that the proposed exchange is neither a “replacement” of lost spectrum with comparable spectrum, nor an “equal exchange.”

²⁵ Tellingly, the recommended policies and procedures in Appendix F of the *Supplemental Comments* (and agreed upon by Nextel) indicate clearly that the entity responsible for causing interference is obligated to resolve that interference. The Appendix states, “All licensees in the 800 MHz band operating low-site cellular systems are equally obligated to participate in responding to interference complaints and for mitigating their contribution to actual interference.” Appendix F at F-1.

²⁶ A case that is directly analogous to the present situation is the proceeding relating to WVEU-TV’s operations on UHF-TV channel 69 in Atlanta, Georgia. The operations of this station caused objectionable interference to land mobile stations operating in the adjacent 800 MHz band, including public safety operations. The FCC held WVEU financially responsible for resolving the interference, including paying for the relocation of affected land mobile stations. *See Broadcast Corporation of Georgia (WVEU(TV)) Atlanta Georgia*, 92 FCC 2d 910 (1982), *recon. denied*, 96 FCC 2d 901 (1984).

²⁷ *See Supplemental Comments* at ii, 4 at n.6, 13.

²⁸ *See* September 23, 2002 Comments of Nextel at 24.

The proposed “spectrum exchange” will significantly increase the value of Nextel’s spectrum assets. The proposed chart illustrates that the net increase in value of Nextel’s spectrum holdings would be at least \$2 billion if Nextel’s proposal were adopted:

<u>Description</u>	<u>(Loss)/Gain in Value</u>
Value of Surrendered Spectrum	(\$2 billion) ²⁹
Nextel Funding Commitment	(up to \$850 million)
Value of Nationwide 1.9 GHz license	at least \$4.5 billion ³⁰
Enhanced Value of Nextel’s 800 MHz	at least \$500 million ³¹
Total Net Gain ≈ \$2.15 billion	

This projected increase in asset value alone demonstrates that the proposed spectrum swap is much more than an “equal exchange.” Even if the Commission were to ignore the assignment of dollar values, simply comparing the spectrum that Nextel would be surrendering against the PCS license that it would be acquiring makes it clear that the spectrum exchange would greatly improve Nextel’s spectrum position. Nextel would receive a 10 MHz nationwide license suitable for the immediate provision of personal communications services. However, Nextel is not surrendering 10 MHz of spectrum with a nationwide footprint. Nextel does not have a nationwide footprint in either the 700 MHz or 900 MHz band and the amount of 800 MHz spectrum that it purports to lose varies on a market-by-market basis. The spectrum swap would significantly improve Nextel’s coverage.

²⁹ See *id.*

³⁰ This figure is based on a 1.6 \$/MHz/pop value derived from Access Spectrum’s analysis of Verizon Wireless’s recent acquisition of PCS licenses held by Northcoast Communications LLC in December of 2002. See http://investor.verizon.com/news/VZ/2002-12-19_X78643.html.

³¹ This is Access Spectrum’s estimate of the enhanced value of the 800 MHz licenses Nextel retains that would be aggregated into a consolidated block of spectrum immediately adjacent to the existing 800 MHz cellular radio service allocation. This aggregation permits more efficient use of the 800 MHz spectrum and thus enhances the value of Nextel’s holdings.

Also, due to incumbent broadcast television stations operating on UHF-TV channels 60-69, Nextel's 700 MHz spectrum is largely unusable for the foreseeable future. Without further Congressional action to expedite the digital television transition, this spectrum is likely to remain occupied and thus unavailable in the major markets for the next 5 to 7 years and perhaps longer. By contrast, the 1.9 GHz spectrum is subject to FCC "emerging technologies" relocation policies and could be immediately cleared for the provision of PCS services. Thus, the spectrum swap would also improve Nextel's access to immediately available spectrum.

In addition, the Consensus Parties propose that Nextel not surrender its 900 MHz spectrum for at least 4 to 5 years, *e.g.*, six months after completion of the 800 MHz band realignment period, which is estimated to take a *minimum* of 42 months from the effective date of any Report & Order in this docket.³² However, during the realignment period, Nextel plans to use its 900 MHz spectrum to entice private wireless licensees to migrate out of the 800 MHz band on a "2 for 1" basis.³³ Further, it is likely that Nextel will engage in private negotiations to relocate 800 MHz incumbents to the 900 MHz band even after the "2 for 1" period has ended. Accordingly, any such relocations will deplete Nextel's inventory of 900 MHz spectrum – with the extent of the depletion remaining unknown for at least 33 months following a Report and Order. Yet the Consensus Parties' ask the Commission to provide Nextel with its 1.9 GHz "replacement" spectrum immediately.³⁴ Under this scenario, Nextel would receive this valuable

³² See *Supplemental Comments* at 34.

³³ See *id.* at 25. Under the proposal, B/ILT and H-SMR incumbents choosing to voluntarily relocate will receive four 12.5 kHz channels at 900 MHz for each 25 kHz channel vacated at 800 MHz. By foregoing any relocation cost compensation, relocating licensees can receive such "bonus" channels within the first 33 months after the effective date of the Report and Order adopting the Consensus Parties' proposal. See *id.*

³⁴ See *id.* at 34-35.

and readily available spectrum before it has performed any of its obligations to mitigate interference. Assuming a reduction of Nextel's 900 MHz spectrum scheduled to be returned to the Commission, the spectrum swap would thus improve Nextel's inventory of spectrum.

Finally, the spectrum that Nextel is surrendering is simply not equivalent to the 1.9 GHz PCS spectrum because: 1) the surrendered spectrum is not contiguous and could not be deployed in an integrated network using a single handset; 2) the 700 MHz spectrum is a Guard Band subject to high levels of interference from commercial operations in adjacent bands;³⁵ 3) as a Guard Band manager, Nextel is prohibited from using the entirety of its 700 MHz spectrum for its own purposes – at least 50.1 percent of its 700 MHz spectrum must be made available for leased use by unaffiliated entities; 4) Nextel, its affiliated entities and its lessee customers are *prohibited* from deploying cellularized networks in the 700 MHz Guard Band allocation; 5) equipment availability for both the 700 MHz and 900 MHz bands is limited with few digital technologies available; and 6) the 800 MHz and 900 MHz spectrum is comprised of interleaved channels of relatively narrow bandwidth that are unsuitable for advanced wireless technologies.³⁶

³⁵ Nextel's proposal that its 700 MHz licenses be reallocated for public safety use is ill-conceived. The Commission has already determined that Nextel's 700 MHz spectrum is not suitable for public safety applications because of the high risk of interference from commercial operations. *See* Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299 (2000). In fact, this spectrum was designated to serve as a guard band to protect public safety operations. Second, the allocation of the 746-806 MHz band was set by Congress in the Balanced Budget Act of 1997, which allocated 24 MHz for public safety use and 36 MHz for commercial use. *See id*; *see also* Section 337(a) of the Communications Act, 47 U.S.C. § 337(a), as added by § 3004 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). Converting Nextel's spectrum to public safety use would thus require Congressional action.

³⁶ In addition, it is likely that much of the 800 MHz spectrum that Nextel would be surrendering is now unusable by Nextel. In deploying a cellular system on interleaved channels that are authorized on a site-specific basis, Nextel knew that some portion of its spectrum

As the above discussion demonstrates, the proposed “spectrum swap” would significantly enhance Nextel’s spectrum assets and nationwide spectrum position compared to the status quo, creating an unjustified spectrum and economic windfall for Nextel, *the primary source of 800 MHz interference*.

Moreover, as a number of commenters have repeatedly pointed out, such a windfall would violate Section 309(j) of the Communications Act.³⁷ Section 309(j) mandates, with certain exceptions not applicable here, that the Commission assign licenses to qualified applicants through a system of competitive bidding, unless there are no mutual exclusive applications for those licenses.³⁸ As noted above, under the proposed “spectrum exchange,” Nextel would receive a nationwide PCS license without participating in the competitive bidding process. Given the explosive growth in demand for spectrum based services and applications and the recognized lack of currently available spectrum to meet this demand,³⁹ it is beyond doubt that other applicants would bid for such valuable spectrum if the Commission were to hold an auction in compliance with 309(j). Since the swap returns spectrum to the Commission that is unequal in value, access or commercial usefulness, an auction of the returned licenses would not

holdings would have to lay idle as part of a self-imposed guard band to avoid harmful interference to adjacent channel operations. By restructuring its channels into a contiguous block of spectrum, Nextel is receiving spectrum that it can put to more effective use by reducing its need for self-imposed guard band channels.

³⁷ See, e.g., Aug. 7, 2002 Reply Comments of ALLTEL, *et. al*, at 10; Sept. 23, 2002 Comments of Verizon Wireless at 10; Sept. 23, 2002 Comments of CTIA at 7.

³⁸ See 47 U.S.C. § 309(j)(1)-(2) (2002).

³⁹ See *Spectrum Policy Task Force Report*, ET Docket No. 02-13, (rel. November 7, 2002) at 14 (noting that “[d]ue to the growth in demand for spectrum-based services, many spectrum users seek additional spectrum and it now appears as though spectrum demand is outstripping spectrum supply”).

be comparable. In enacting section 309(j), Congress intended for the Commission to use this assignment tool to ensure the highest and best use for the spectrum, which Congress determined could best be assured through a competitive bidding process. The Congress also sought to ensure that the public received fair value for the use of its resource. Neither of these goals will be achieved if the Commission approves the proposed spectrum exchange. Awarding Nextel such a license without the benefit of competitive bidding would violate Section 309 of the Communications Act and run contrary to the Commission's goal of ensuring that the scarce spectrum resource is put to its highest and best use.⁴⁰

C. Competitively Neutral Mechanisms Exist To Make Licensees Surrendering Spectrum “Whole” While Remaining Consistent with the Communications Act and FCC Policy and Precedent.

To the extent that any 800 MHz licensee (including Nextel) is required to surrender any usable spectrum as part of a 800 MHz interference mitigation program, the Commission can consider whether such surrender warrants reimbursing the licensee for the fair value of that surrendered spectrum through the issuance of an freely transferable Auction Discount Voucher (“ADV”) that can be used by the licensee (or a transferee) in any upcoming auction of spectrum.⁴¹ Unlike the Consensus Parties’ proposal, the grant of an ADV targets and quantifies

⁴⁰ See NextWave Personal Communications, Inc. and NextWave Power Partners Inc. (Petition for Reconsideration Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses); In re Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, 15 FCC Rcd 17500 at ¶ 27 (2000) (“Section 309(j) embodies a presumption that licenses should be allocated as a result of an auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use.”).

⁴¹ This approach was successfully implemented by the Commission to resolve litigation with Qualcomm Incorporated pertaining to the Commission's former pioneer's preference program. See *In the Matter of Qualcomm Incorporated; Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals; Service Rules for the*

the value of specific spectrum being surrendered and provides a corresponding credit to the licensee and, therefore, it is consistent with Section 309 and with the FCC's auction and spectrum allocation policies. As in the previous instance when an ADV has been issued, the Commission and the licensee would need to agree on a methodology for valuing the licensees' spectrum loss. As the Commission has previously recognized, the grant of an ADV provides the recipient with the flexibility to select spectrum through the Commission's spectrum auctions, thereby "facilitat[ing] . . . [the] ability to acquire a license or licenses for spectrum that ... [the recipient] values most highly."⁴² An ADV also maintains competitive neutrality by ensuring that no licensee gets an improper marketplace advantage in the delivery of advanced wireless services simply because it fulfilled its responsibility to participate in the resolution of harmful interference it is causing.

IV. CONCLUSION

Access Spectrum urges the Commission to remain vigilant in maintaining as its guiding principle the identification of practical solutions that resolve the potential for interference at 800 MHz while minimizing the disruption to incumbent licensees and the existing allocation structure. Consistent with this principle, Access Spectrum urges the Commission to adopt measures designed to resolve interference where it may – and when it does – occur by codifying policies and procedures designed to resolve interference at the local level. Access Spectrum also urges the Commission to facilitate the interference identification and resolution process by creating an independent entity that would immediately identify interference "hot spots,"

746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Order*, 16 FCC Rcd 4042 (2000).

⁴² See *id.*, 16 FCC Rcd at 4049 ¶ 19.

prioritize those areas with the greatest susceptibility to interference and work with the parties involved to implement immediately the measures necessary to mitigate the interference. Such measures, widely recognized as necessary regardless of any band realignment, offer a more efficient, far less burdensome solution than the wholesale nationwide realignment of the 800 MHz band proposed by the Consensus Parties.

Following this course of action obviates any possible justification for the “spectrum exchange” aspect of the Consensus Parties’ plan, which should be rejected in any case. As the primary source of 800 MHz interference, Nextel is required to resolve the interference caused by its operations, and cannot condition the fulfillment of that obligation on receiving an unjustified and legally questionable spectrum windfall. To the extent Nextel or any other 800 MHz licensee is required to surrender any spectrum of value, the Commission can make the licensee “whole” through an Auction Discount Voucher that maintains competitive neutrality and remains consistent with Section 309 and FCC policy and precedent.

Respectfully submitted,

ACCESS SPECTRUM, LLC

By: /S/ Mark E. Crosby

Mark E. Crosby, President
Access Spectrum, LLC
Two Bethesda Metro Center
Bethesda, Maryland 20814
(301) 941-1100

February 10, 2003